Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-979

ARTHUR G. McKEE & COMPANY,
Petitioner,

v.

G.C.S., INC., I.S.C., INC., McJUNKIN CORPORATION,
and the HON. DANIEL J. SNYDER, JR.,
United States District Judge for the
Western District of Pennsylvania,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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G.C.S., Inc. and I.S.C., Inc., Respondents, file the following Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Arthur G. McKee & Company, which Petition seeks review of the Judgment Order of the United States Court of Appeals for the Third Circuit entered, after oral argument, on October 28, 1976.

QUESTIONS PRESENTED

1. Whether this Court ought to grant review of a refusal by the circuit court to overturn certain discretionary pretrial orders of the trial court, relating to matters of severance, stay, transfer and discovery.

2. Whether this Court ought to grant review of a judgment order of the Court of Appeals for the Third Circuit, relating to certain pretrial procedural matters, when the prerequisites of Rule 19 of this Court are not satisfied.

STATEMENT OF THE CASE

Introduction

Petitioner seeks review by this Court of the refusal by the United States Court of Appeals for the Third Circuit to overturn certain pre-trial orders of the district court involving an exercise of its discretion and relating to severance, transfer, stay, and discovery. Petitioner urges that there is *no* basis upon which the Third Circuit could affirm these pre-trial procedural determinations of the trial court and that there is *no* basis upon which this Court could affirm the Judgment Order of the Third Circuit. See *Ryerson v. United States*, 312 U.S. 405, 408 (1941). Furthermore, since the Third Circuit was requested by this same Petitioner, by means of a Petition for Writ of Mandamus and otherwise, to exercise its discretion, which request was granted, any review granted by this Court would be limited to an examination of whether or not the Third Circuit acted arbitrarily or abused its discretion. *See Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

Petitioner represents that there is a conflict between three district judges and one state court judge (Petition 4, 9-12), an anemic adaptation of the normal assertion of a conflict between courts of appeal. The fact is that those judges who have considered the "Disputes Clause" relied upon *in toto* by Petitioner have all agreed that, while this particular clause may, in a given case, apply to direct actions involving the Petitioner and Respondent G.C.S., Inc., that, *under the circumstances of this case*, it did not require transfer, severance or stay. Plain and simple, there is no dispute whatsoever among the federal and state trial courts cited by the Petitioner.

Petitioner further represents that the district court, in the person of Respondent, the Honorable Daniel J. Snyder,

Jr., did not respect the decision of this Court in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). (Petition 4-5, 10, 13-16). This is clearly not the case. Judge Snyder specifically recognized and specifically applied the *Bremen* decision. (App. 5, 8). Furthermore, he has enforced forum-selection clauses in other cases, quoting extensively from *Bremen*. *Spatz v. Nascone*, 364 F. Supp. 967, 975-80 (W.D. Pa. 1973) (Snyder, J.). Giving thoughtful analysis and due consideration to the parties and issues before him in this case, however, and to the judicial and administrative factors, including the "Disputes Clause," in favor of and contrary to the motions presented, Judge Snyder exercised his discretion and declined to grant the relief requested (severance, stay, transfer, discovery). (App. 8-10, 13-14, 15-16). It is Judge Snyder's exercise of discretion which Petitioner questioned unsuccessfully before the Third Circuit and which Petitioner now wishes this Court to review.

Stripped of Petitioner's representations, then, it is clear that Petitioner seeks immediate appellate review of certain pre-trial orders, relating to severance, stay, transfer and discovery, which matters traditionally have been found to be within the province of the trial court. There being no conflict below or with any decision of this Court, therefore, and the requisites of Rule 19(1)(b) of the Rules of this Court not having been otherwise satisfied by Petitioner, the Petition for Writ of Certiorari should be dismissed. As implicitly recognized by the Third Circuit in its Judgment Order of October 28, 1976, to grant pre-trial review in such instances would constitute a derogation of the trial court's proper function and would accomplish the delay which Petitioner seeks.[1]

[1]The countless motions and procedural manuverings resorted to by the Petitioner as a means of postponing any trial in this matter are described in detail on pages 5-8 *infra*. under the heading of "Procedural Summary."

Narrative Summary

In late 1973 and early 1974, the plaintiff below, Respondent McJunkin Corporation, a supplier of pipe, valves and fittings, and Petitioner Arthur G. McKee & Company negotiated the sale and purchase of the industrial valves required for the construction of a water purification facility at Clairton, Pennsylvania. McKee was under contract to the United States Steel Corporation to design and construct said facility on a "turn-key" basis.

Thereafter, in January, 1974, McKee selected Respondent G.C.S., Inc. as its piping subcontractor. In April, 1974, G.C.S. and McKee executed a written subcontract. The written McKee-G.C.S. subcontract incorporated by reference certain "Subcontract General Terms and Conditions" and certain "Supplementary Subcontract General Terms and Conditions", which were pre-printed provisions used by McKee in connection with all subcontracts. These form provisions were neither attached to the written subcontract nor discussed by the parties. One of the "Subcontract General Terms and Conditions" is the "Disputes Clause" upon which the entire Petition for Writ of Certiorari is bottomed. Subsequent to the execution of that subcontract, McKee assigned its valve purchase order with McJunkin to G.C.S.

McKee revised its engineering throughout the Clairton project. These revisions, and McKee's early uncertainty as to valve requirements, were two factors which created significant excesses in valves. Accordingly, during the course of the project, McKee and McJunkin both assured G.C.S. that either McKee or McJunkin would take back the excess valves.

Following the completion of G.C.S.'s piping subcontract, McJunkin filed the instant suit against G.C.S. for valves delivered but for which no payment had been received.

G.C.S. denied liability for same and joined McKee, alleging that the valves in question were McKee's and/or McJunkin's responsibility.

Procedural Summary

A. DISTRICT COURT:

Judge Snyder first considered the applicability of the "Disputes Clause" in December, 1975, when, on December 29, 1975, McKee filed a Motion to Sever and Transfer the Third-Party Claim of G.C.S. Following an initial brief, oral argument and a reply brief by McKee, in which McKee asked Judge Snyder to exercise his discretion (App. 9), Judge Snyder filed his Opinion and Order of March 22, 1976 denying the relief requested. (App. 3). In the course of considering the various factors raised by McKee in support of its motion, Judge Snyder found that the G.C.S. third-party claim over against McKee was a derivative action squarely within the framework of Rule 14(a) of the FEDERAL RULES OF CIVIL PROCEDURE. (App. 8). He further found that the "Disputes Clause" did not, by its very terms, apply to an independent action commenced against either McKee or G.C.S. by a third-party (McJunkin) (App. 8), and that, under the circumstances of this case, it would not be appropriate to accomplish the result (severance, stay or transfer) requested by McKee (App. 8).[2] Above all, Judge Snyder recognized that he was confronted by the competing interests of three different parties and that he would have to consider those interests in the context of orderly judicial administration. (App. 8). In his judgment, the interests of all concerned could be best protected if disputes arising out of the McJunkin-McKee valve purchase order were isolated from the much more complex litigation involving G.C.S. and McKee. (App. 9-10).[3] Judge Snyder further stated (App. 8-

[2]See discussion of "Disputes Clause" on pages 12-13 *infra*.
[3]See discussion of other litigation on pages 8-9 *infra*.

10), and he has repeatedly assured all counsel, that the trial of this case will not involve issues unrelated to the valve purchase order.

McKee next filed a Motion for Reconsideration on April 14, 1976. This motion requested reconsideration of the earlier motion to sever and also moved for a transfer of the entire proceeding pursuant to 28 U.S.C. §1404(a). In its motion McKee asserted that Judge Snyder's March decision was premised upon "fundamental mistakes of fact" which "mistakes of fact" were highlighted in the Motion for Reconsideration, including McKee's belief that the G.C.S. third-party claim over was not derivative in nature and that the "Disputes Clause" did apply to third-party actions. Again, Judge Snyder heard oral argument on the question.

On May 7, 1976, before Judge Snyder had ruled on the Motion for Reconsideration, McKee filed an Amended Motion to Bifurcate and Stay the Third-Party Action. This third motion raised the contentions previously argued by McKee with only a slight modification in the relief requested. (App. 11-12).

On June 18, 1976, Judge Snyder filed an Opinion and Order denying the outstanding requests (severance, stay, transfer). (App. 11). In his Opinion, Judge Snyder again explained that in his judgment, under the various circumstances of this case, that liability for deliveries pursuant to the McJunkin purchase order should be determined in his courtroom. (App. 12-14). No appeal was taken from this ruling or the March ruling. Instead, in the course of a June 15, 1976 Status Conference, McKee consented to a September 27, 1976 trial date.[4]

[4]At the Status Conference Judge Snyder advised all parties as to his position regarding McKee's outstanding motions, anticipating his June 18, 1976 Opinion and Order. (R.).

Notwithstanding the scheduled trial date, McKee "renewed" its earlier motions on July 6, 1976 in the form of a Motion to Strike the Pre-trial Narrative Statement of G.C.S. McKee also sought, in the alternative, to limit the issues to be tried or to reopen discovery. Again, McKee filed a brief in support of its Motion to Strike, asserting for the fourth time the matters originally raised in its December, 1975 Motion to Sever and Transfer. On July 21, 1976, Judge Snyder entered an Order denying McKee's Motion to Strike. (App. 15).

B. THIRD CIRCUIT:

More than thirty days after Judge Snyder's Orders of March 22, 1976 and June 18, 1976, McKee appealed to the United States Court of Appeals for the Third Circuit. To avoid the expired statutory appeal period, McKee styled its appeal as being from the July 21, 1976 Order of Judge Snyder, which Order denied McKee's "renewed" motions to sever and transfer.

Concurrently, McKee filed a Petition for Writ of Mandamus to the same appellate court, raising the matters now pressed in its Petition for Writ of Certiorari. The Third Circuit disposed of both matters, when, on October 28, 1976, following oral argument, it dismissed both the Appeal and the Petition for Writ of Mandamus. (App. 1) Like Judge Snyder, the Third Circuit has had an occasion to follow the *Bremen* decision. *See Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757-58 (3rd Cir. 1973).[5]

In summary, then, McKee first attempted to have the Third Circuit substitute its judgment for that of Judge Snyder; it now seeks to have this Court do the same.

[5]Indeed, this Court relied on precedent in the Third Circuit in rendering the *Bremen* decision. 407 U.S. at 10, n.11, citing *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966).

Other Litigation

On May 16, 1975, G.C.S. and McKee commenced suits against each other in the United States District Court for the Western District of Pennsylvania ("G.C.S. Case") and in the United States District Court for the Northern District of Illinois ("McKee Case"), respectively. As a means of transfering the McKee Case to Pennsylvania where it could be more conveniently tried and where it could be consolidated with the G.C.S. Case and with the instant suit filed by McJunkin, G.C.S. moved to transfer under 28 U.S.C. §1404(a).[6] McKee resisted, notwithstanding its joinder in the instant suit, and the matter was heard by the Honorable Thomas R. McMillen of the Northern District of Illinois. Relying heavily upon the "Disputes Clause" *as it applied to the suit filed by McKee against G.C.S.*, Judge McMillen denied the transfer request in November, 1975. (App. 17).

Thereafter, on March 19, 1976, the Honorable Herbert P. Sorg granted McKee's transfer of venue motion in the G.C.S. Case. He did so exclusively on the basis of comity. (App. 25). Chief Judge Sorg did not make any findings or draw any conclusions as to the applicability of the "Disputes Clause," with respect to third-party actions or otherwise, as same were not necessary to his decision. (*Id.*)

On July 30, 1975, Honeywell, Inc. initiated suit against G.C.S. in the Court of Common Pleas of Allegheny County, Pennsylvania ("Honeywell Case"), seeking monies allegedly owed for instrumentation work performed on the Clairton

[6]There were numerous factors in favor of the Pennsylvania forum. For example, subcontract performance over more than a year's time was in Clairton, Pennsylvania, all but one of G.C S.'s 46 witnesses resided in that locale including 20 persons employed by non-parties who were not subject to subpoena in Illinois, the construction records were there, and a viewing by the jury might well be required due to the complexity and scope of the project. (R. , *see* App. 18-19).

Project. McKee was joined by G.C.S. as an additional defendant in October, 1975. On May 18, 1976, McKee attempted to sever and stay G.C.S.'s claim over for the same reasons presented to Judge Snyder. That court, in the person of the Honorable Warren Watson, denied McKee's request for one of the reasons cited by Judge Snyder: this "Disputes Clause" did not apply to actions commenced by third parties who were not parties to the McKee-G.C.S. subcontract. (App. 28). On this basis Judge Watson specifically distinguished the approach of Judge McMillen in the McKee Case; he further noted the comity underpinning of Judge Sorg's determination in the G.C.S. Case. (App. 28).

REASONS WHY WRIT SHOULD NOT BE GRANTED

THE THIRD CIRCUIT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING PETITIONER'S CONTENTIONS

A. Rule 14, Discretion and the "Disputes Clause"

As Petitioner correctly points out, "*Bremen* does not mandate applying a rigid rule that would require enforcement of forum-selection clauses in all situations." (Petition 15). Specifically, the thrust of the *Bremen* decision is to suggest that forum-selection clauses are generally enforceable where bargained for and where enforcement would be reasonable under the particular circumstances. 407 U.S. at 12-13. It contains no explicit directive to the federal courts to enforce such clauses notwithstanding any other factors. Thus, the application of the "Disputes Clause" in the context of a third-party claim under Rule 14 of the FEDERAL RULES OF CIVIL PROCEDURE, and in the context of motions for severance, stay and transfer (under 28 U.S.C. §1404(a)) must be examined, and was examined by Judge Snyder in this case, in light of the rationales and policies underlying these provisions.

The policies underlying Rule 14(a), have been identified as follows: "to avoid two actions which should be tried together, to save the time and cost of a reduplication of evidence, to obtain consistent results from identical and similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant". 3 J. Moore, FEDERAL PRACTICE §14.04 (2d Ed. 1974), and cases cited therein. Judge Snyder was cognizant of this policy when he stated that "retention of this third-party claim within the confines of this purchase order suit will isolate the supplier, contractor and subcontractor, and will provide for the expeditious resolution of this distinct problem between the parties." (App. 9). Judge Snyder properly exercised his discretion in applying Rule 14(a) by treating the "Disputes Clause" as one of the factors to be considered and finding that it did not override all other considerations.

The Third Circuit affirmed Judge Snyder's application of Rule 14(a) under the particular circumstances of this case. Mr. Justice Brennan's statement in *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 80 S. Ct. 16, 4 L. Ed. 2d 30, 32 (1959) (Opinion in Chambers), therefore becomes directly applicable. In denying a petition for stay, Mr. Justice Brennan stated:

> "But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts."

The policies underlying discretionary transfers of venue under 28 U.S.C. §1404(a) can be summarized best in the words of that statute, namely, to provide for the "convenience of parties and witnesses" and "in the interest of justice". The existence of a contractual forum-selection clause has been held to mitigate the importance of the element of convenience, but has not moved the courts to ignore all the other factors present. *See, e.g., Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757-58 (3d Cir. 1973). Indeed, acceptance of Petitioner's position would be contrary to the "factor inquiry" required by this Court in 28 U.S.C. §1404(a) cases. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

The Third Circuit affirmed Judge Snyder with full awareness of *Bremen*. *See, e.g., Plum Tree Inc. v.*

Stockment, 488 F.2d at 757-58. It found no abuse of discretion in Judge Snyder's interpretation of the precedential authority of *Bremen* under the circumstances of this case. When one examines the discretionary and "reasonableness" language of the *Bremen* opinion, and when one considers that motions for severance, transfer, stay and discovery require the exercise of discretion by the trial court, the positions of Judge Snyder and the Third Circuit are unquestionably sound. Accordingly, there is no order in this case which is contrary to the *Bremen* decision.

G.C.S. also directs this Court's attention to the requirements of the "Disputes Clause." Unlike a true forum-selection clause, there is no single forum for resolution designated, either directly or indirectly, by the parties. To the contrary, the "Disputes Clause" is merely precatory by design and in its language: it describes an optimum but acknowledges that that optimum may not be practical. Thus, the introductory paragraph, which sets the tone and purpose for the entire "Disputes Clause", reads:

> 36. DISPUTES: *It is the general intention* of the parties that any dispute relating to this Subcontract or the Prime Contract or involving a matter or question of law or fact common to them or the parties thereto shall be settled, *to the extent feasible*, before a single forum selected by Contractor, and a decision by such forum with respect to any such question or matter shall be binding on Subcontractor, provided *that it has a reasonable opportunity to be represented and heard. To this end:* [Emphasis added.]

Consistent with this proviso, subparagraph (b) of the clause states that the forum selected is to be a "reasonable" one which can "best determine and settle *most aspects*" of the

dispute, provided G.C.S. shall have "the opportunity for adequate representation." (Emphasis added).[7]

Moreover, Petitioner conveniently ignores the fact that the "Disputes Clause" concentrates solely on disputes between G.C.S. and Petitioner and Petitioner and the "Owner", the United States Steel Corporation, *not* unidentified third parties who are not signatories thereto. This conclusion is based on the language in the introductory paragraph quoted above, to the effect that the scope of the clause is limited to disputes:

> "...relating to [the G.C.S.-McKee subcontract] or the [McKee-USS contract] or involving a matter or question of law common to them *or to the parties thereto...*" [Emphasis added.]

Given these features of the "Disputes Clause" G.C.S. submits that Judge Snyder's decision, and that of the Third Circuit, cannot be attacked on any basis. The clause in question simply does not apply, *by its very terms*, to the case before this Court. Accordingly, it can never be said that the existing orders are in conflict with *Bremen*. For this additional reason, therefore, McKee cannot sustain its Rule 19 burden of showing that the Court of Appeals decision upholding Judge Snyder was in conflict with *Bremen*.

B. "Collateral Order Rule"

McKee does not articulate the ground for this Court's granting of the Petition based upon its second line of argument. (Petition 16-19). G.C.S. can only presume that Petitioner's position is to the effect that by dismissing Petitioner's appeal the Third Circuit has rendered a decision

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[7]Portions of the "Disputes Clause" are contained on pages 7-8 of the Petition. As noted by Judge Snyder (App. 8), the "Disputes Clause" as written is an expression of a hoped for result and not an expression of an absolute covenant. Indeed, its precatory language anticipates its very non-applicatic n in situations such as the instant case.

in conflict with certain decisions of this Court, namely, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449 (1935).

The *Cohen* decision marked the emergence of the so-called "collateral order" expansion of the rule that only final orders are appealable as of right to the courts of appeal under 28 U.S.C. §1291. Since the decision in *Cohen*, the collateral order rule has evolved into an analytical framework which prescribes "some evaluation of the competing considerations underlying all questions of finality — 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) ..." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974). Thus, in addition to the mandatory presence of the four criteria cited in *Cohen* (*see* 337 U.S. at 546-67), the collateral order rule also contemplates a general balancing test between the competing considerations cited by Mr. Justice Powell in *Eisen*, suggesting a range of discretion to be left with the Third Circuit in applying the rule.

If it is assumed that the Third Circuit in its Judgment Order of October 28, 1976, did not reach a finding on the merits, which McKee implies and which G.C.S. does not concede, G.C.S. submits that the Third Circuit's decision to dismiss McKee's appeal was a proper exercise of its discretion in that the collateral order rule did not apply in the instant case. The decision of the Third Circuit in this case is also consistent with that court's general perception of the scope of application of the collateral order rule. *See Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert denied*, 423 U.S. 832 (1975); *Nolfi v. Chrysler Corp.*, 324 F.2d 373 (3d Cir. 1963). The Court of Appeals decision is not, therefore, in conflict with *Cohen*.

With regard to McKee's argument based on *Shanferoke, supra*, suffice it to say that the Third Circuit could properly dismiss Petitioner's appeal from Judge Snyder's denial of the motion to stay on either of two grounds. First, McKee's defense, if any, based on the "Disputes Clause" is not truly an equitable one. Rather, it is based on an alleged contractual right to litigate in another court and is distinguishable from the right to arbitration deemed to be an equitable defense in *Shanferoke* and its progeny. Second, the Third Circuit properly applied the rule in *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935), where this Court distinguished a request for stay from an injunction, by stating that when a court grants or denies a request to stay in an action before it, it is acting "by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice". 293 U.S. at 382.

In view of the foregoing, the Respondents submit that by dismissing McKee's appeal, the Third Circuit did not render a decision in conflict with any applicable decision of this Court and that it properly exercised its discretion.

CONCLUSION

Petitioner Arthur G. McKee & Company has not demonstrated that the October 28, 1976 Judgment Order of the Third Circuit is a decision on a federal question which is contrary to any applicable decisions of this Court; nor has it demonstrated a conflict between various courts of appeal; nor has it demonstrated any of the other bases upon which Writs of Certiorari are granted by this Court as set forth in Rule 19. Moreover, G.C.S. has demonstrated that both Judge Snyder and the Third Circuit properly exercised their respective discretionary functions in conscientiously carrying out their given responsibilities. The Petition should, therefore, be denied and this case should be permitted to go to trial without further delay.

Respectfully submitted,

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